Nos. 06-1195 and 06-1196

In the Supreme Court of the United States

LAKHDAR BOUMEDIENE, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

KHALED A.F. AL ODAH, NEXT FRIEND OF
FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Solicitor General, on behalf of respondents George W. Bush, *et al.*, does not oppose petitioners' motion for leave to file a supplemental brief but respectfully moves for leave to file a supplemental brief responding to petitioners' brief and to certain additional topics raised by petitioners' counsel at oral argument.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007

TABLE OF AUTHORITIES

Cases: Page

Greene v. *Secretary of State for Home Affairs*, [1942] App. Cas. 284 (H.L. 1941) (U.K.) 1, 3

Liversidge v. *Anderson*, [1942] App. Cas. 206 (H.L. 1941) (U.K.) 1, 3, 4

Rex ex rel. Zadig v. *Halliday*, [1917] App. Cas. 260 (H.L. 1917) (U.K.) 4

Schiever's Case, 96 Eng. Rep. 1249 (K.B. 1759) 2

The King v. *Superintendent of Vine St. Police Station*, 1 K.B. 268, 278 (1916) (Eng.) 2

Statutes and regulations:

Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 2

East India Company Act, 1781, 21 Geo. III, ch. 70 (U.K.) 6

§ 2 6

§ 3 6

Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, ch. 62 (U.K.) 3

Habeas Corpus Suspension Act, 1777, 17 Geo. III, ch. 9 (U.K.) 7

§ 1 7

Defence (General) Regulations, 1939, S.R. & O. 1939/927, § 18B (U.K.) 3

Order in Council Amending the Defence (General) Regulations, 1939, S.R. & O. 1939/1681 (U.K.) 3

Miscellaneous: Page

Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications* (University of Va. L. Sch. Pub. L. & Legal Theory Working Paper Series No. 72, 2007) <http://law.bepress.com/cgi/viewcontent.cgi?article=1118&context=uvalwps> ... 6

Robert J. Sharpe, *The Law of Habeas Corpus* (2d ed. 1989) 1, 4, 5, 6

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents submit this supplemental brief in response to petitioners' supplemental brief addressing *Liversidge* v. *Anderson*, [1942] App. Cas. 206 (H.L. 1941) (U.K.), and *Greene* v. *Secretary of State for Home Affairs*, [1942] App. Cas. 284 (H.L. 1941) (U.K.).[1] As

[1] These cases were discussed in a treatise relied upon by both parties. See Robert J. Sharpe, *The Law of Habeas Corpus* 100-106 (2d ed. 1989) (Sharpe). In addition, as petitioners note (Supp. Br. 1 n.1),

explained at oral argument, those cases demonstrate that the common-law rule that a habeas petitioner was not permitted to controvert the facts as set forth in the return would have applied to executive detentions during wartime. See Tr. 46:2-21. In 1789, that principle would have prevented detainees in petitioners' circumstances from using habeas corpus to raise fact-based challenges to the military determination that they were enemy combatants. That common law rule, together with the geographic limits on the writ and the historical unavailability of habeas to "prisoners of war,"[2] would have precluded petitioners from obtaining anything like the review they receive under the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739. See Gov't Br. 37-40, 46-47 (citing additional authorities); see also *Schiever's Case*, 96 Eng. Rep. 1249 (K.B. 1759) (per curiam).

1. Petitioners contend (Supp. Br. 1) that *Liversidge* and *Greene* are inapplicable for two reasons: they "relied squarely on unique emergency legislation passed by Parliament," and they are no longer considered good law in the United Kingdom. Neither of those arguments undermines the relevance of those decisions to this case.

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petitioners' amici relied on the *dissenting* opinion in the *Liversidge* case.

[2] Post-1789 British cases underscore that the British courts did not view prisoners of war as a specialized class, but used the phrase generically to refer to enemy combatants. Indeed, the "prisoner of war" label was even extended to a non-combatant German national who had been resident in England for 25 years. See, *e.g.*, *The King* v. *Superintendent of Vine St. Police Station*, 1 K.B. 268, 278 (1916) (Eng.) (If the executive "represents to this Court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and treat him as a prisoner of war, he must be regarded for the purposes of a writ of habeas corpus as a prisoner of war.").

As indicated at oral argument, see Tr. 46:4-13, both *Liversidge* and *Greene* involved persons detained under Section 18B of the Defence (General) Regulations, 1939, S.R. & O. 1939/927 (U.K.) (as amended by Order in Council Amending the Defence (General) Regulations, 1939, S.R. & O. 1939/1681 (U.K.)) which implemented the Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, ch. 62 (U.K.). That provision permitted the Secretary of State to detain individuals if he "has reasonable cause to believe any person to be of hostile origin or associations * * * and that by reason thereof it is necessary to exercise control over him." *Liversidge*, [1941] App. Cas. at 213. To be sure, the principal question before the Law Lords was one of interpreting that regulation. But the regulation could plausibly (indeed, more naturally) have been read to call for an objective inquiry into whether there was reasonable cause to believe that the detainee was "of hostile origin" and that his detention was necessary, which would have opened the way for a factual inquiry, or construed to call for a completely subjective inquiry that would have foreclosed factual review. Over a strong dissent from Lord Atkin suggesting they were distorting the plain meaning of text, see *id.* at 225-247, the majority held that the regulation required only an inquiry into whether the Secretary, in good faith, subjectively believed that detention was appropriate, see *id.* at 219-220. Under that interpretation, the court engaged in no factual review at all. And in *Greene*, the House of Lords applied that interpretation to affirm the denial of a writ of habeas corpus to a person detained under the regulation, without the need for detaining authorities even to submit a supporting affidavit. [1941] App. Cas. at 290-296.

Liversidge and *Greene* are relevant to the scope of habeas for at least two reasons, notwithstanding that they involved a special statutory detention authority. First, if petitioners were correct in their claim that common law habeas courts would have engaged in factual review of executive detention in 1789, it is hard to imagine that the Law Lords would have strained to interpret the regulation to foreclose any meaningful factual review. To the contrary, these cases illustrate that as late as 1941, British courts did not and would not engage in a fact-intensive review of detention authority exercised pursuant to a statute, even a statute that (as Lord Atkin believed) could have been read to call for such review.[3] Indeed, the Law Lords' attitude toward the prospect of such factual review is reflected in the fact that more than one of the Law Lords invoked Lord Finlay's statement in a World War I-era case, *Rex ex rel. Zadig* v. *Halliday*, [1917] App. Cas. 260 (H.L. 1917) (U.K.), that "no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law." *Liversidge*, [1941] App. Cas. at 259-260 (Lord Wright) (quoting *Halliday*, [1917] App. Cas. at 269); *id.* at 281 (Lord Romer).

Second, some of the Law Lords in the majority did discuss the history of the writ in Britain. None of that discussion suggested that there would have been factual review of military detention of enemy combatants. To

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[3] As Professor Sharpe noted: "There was something more involved than the question of how a familiar phrase should be interpreted in law. At stake was the issue of the appropriateness of judicial interference with the executive in time of war." Sharpe 103; see *id.* at 99 ("On the surface, this is very much a matter of statutory interpretation, but underneath, very much a matter of judicial attitude.").

the contrary, that discussion reaffirms that the common-law rule against controverting the return was not modified until the habeas statute of 1816, and that there are no cases sanctioning a factual inquiry into the military detention of enemies at any time up to and including 1941. Significantly, petitioners have identified no case in which British courts engaged in factual review of wartime detention.

Nor is it relevant (Supp. Br. 2-3 & n.2) that subsequent courts have embraced Lord Atkin's dissenting views as to the construction of the regulation. Indeed, to the extent those decisions criticize the majority's strained construction of the regulation, they only underscore the lengths to which the majority went to avoid factual review. In any event, those later decisions hardly speak to state of factual review in 1941, let alone 1789. In fact, as late as 1989, Professor Sharpe suggested that Commonwealth courts were still following the majority reasoning in *Liversidge* and *Greene*. Robert J. Sharpe, *The Law of Habeas Corpus* 106 (2d ed. 1989) (Sharpe). But whatever the exact nature and timing of later developments, the salient point is that as late as 1941 there was no appetite in the British courts on habeas (as in *Greene*, for example) to engage in a fact-intensive review of wartime detention by the executive. Although petitioners have suggested that deference to factual determinations was limited to post-conviction review of criminal trials, see, *e.g.*, 06-1195 Reply Br. 11, and would not extend to executive detention without trial, Professor Sharpe, after reviewing *Liversidge* and *Greene*, aptly summarized the British practice as giving the executive's decision to detain in wartime "the same respect accorded to the record of a superior court. It was said that habeas corpus merely required the produc-

tion of the immediate legal cause for the prisoner's detention, and that if the order were regular on its face, the application had to be refused." Sharpe 102 (footnote omitted).

2. At oral argument, counsel for petitioners raised several additional topics that warrant a brief response.

a. Petitioners have relied on the Indian cases for the proposition that habeas would have been available to non-citizens outside of sovereign territory. Tr. 12:15-24. As explained in the brief for respondents (at 30-31), those cases were based on a *statutory* grant of jurisdiction to courts sitting in India, and they therefore do not demonstrate the territorial scope of the *common-law* writ. That point is underscored by an act of 1781 that restricted the availability of the writ to the indigenous residents, apparently because some exercises of the writ over local residents had caused friction. See East India Company Act, 1781, 21 Geo. III, ch. 70 (U.K.); Paul Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications* 75-77 (University of Va. L. Sch. Pub. L. & Legal Theory Working Paper Series No. 72, 2007) <http://law.bepress.com/cgi/viewcontent.cgi?article=1118&context=uvalwps>.[1] That statute illustrates both the statutory nature of the writ in India and the fact that, at the time of the founding, the writ did not apply to aliens in the same way that it applied to citizens.

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[1] Section 2 of the East India Company Act made an order of the governor general a complete defense to any action—including a habeas action—while Section 3 of that act provided that "with respect to such order or orders of the said governor general and council as do or shall extend to any *British* subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this act had never been made."

b. Petitioners also invoked the 1777 statute suspending the writ of habeas corpus during the American Revolution, suggesting that the statute demonstrates that the writ must have extended to the colonies and to the high seas. Tr. 25:18-25; Habeas Corpus Suspension Act, 1777, 17 Geo. III, ch. 9 (U.K.). But, of course, the colonies were regarded by Britain as sovereign territory. More importantly, the statute began by noting that "*many persons have been seized*" in connection with the "*rebellion and war*," and that "such persons have been, or may be brought into this kingdom, and into other parts of his Majesty's dominions, and it may be inconvenient in many such cases to proceed forthwith to the trial of such criminals." *Id.* § 1. The latter clause displays a recognition that the "inconvenien[ce]" caused by the availability of the writ would arise not when prisoners were captured on the high seas, but only when they were brought into the sovereign territory of the realm. In other words, the statute underscores that the writ ran within "his Majesty's dominions," and not elsewhere.

c. Finally, petitioners discussed the case of Murat Kurnaz, a detainee who was transferred to the custody of the Federal Republic of Germany. Tr. 75:6-76:11. According to petitioners, Kurnaz was "released by the government because of the fact that" he had a lawyer, who was able to gather evidence "that would not have been allowed in" in proceedings conducted under the DTA. But contrary to petitioners' suggestion, detainees may be (and are) represented by counsel in DTA proceedings, and DTA counsel may investigate or gather information in connection with those proceedings.[5] More

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[5] To be sure, as would be true in a habeas proceeding, attorney access to classified matters could be restricted in appropriate circum-

over, the DTA does not preclude the introduction of new evidence. If a detainee discovers new evidence that is material to the question whether he is an enemy combatant, he can ask that the evidence be considered by a new CSRT, see Gov't Br. 56 & n.30, and the decision of that CSRT (if adverse to the detainee) can then be reviewed in the District of Columbia Circuit under the DTA.

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For the foregoing reasons, as well as for the reasons stated in our principal brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007

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stances. But there is no inherent reason why attorneys would have greater access to highly sensitive classified matters in a habeas proceeding than they would in a court proceeding under the DTA. Indeed, the piece of information that purportedly led to the attorney investigation in the Kurnaz case was presented to Kurnaz in the unclassified summary of the evidence at the CSRT hearing, and that summary (all agree) is a part of the record on review in a DTA proceeding before the District of Columbia Circuit.